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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1944.

No. 167

LOUIS F. HALL & CO., INC.,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit and Brief in Support of Petition.

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LOUIS F. HALL & CO., INC., *Petitioner,* vs. THE UNITED STATES OF AMERICA, *Respondent.*	No. .....

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit and Brief in Support of Petition.

To the Honorable Harlan F. Stone, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

Summary Statement of Matter Involved.

A judgment dismissing petitioner's complaint was entered by the District Court of the United States for the Southern District of New York on February 25, 1944 (R. p. 56). This judgment was affirmed by the United States Circuit Court of Appeals for the Second Circuit on April 9, 1945 (R. p. 65). Petitioner prays that a writ of certiorari issue to review said affirmance.

On September 7, 1937, petitioner filed with the office of the Collector of Internal Revenue, Second District of

New York, an amended claim for refund of $28,669.36 paid as floor stocks taxes under the provisions of the Agricultural Adjustment Act of 1933 (R. p. 15). This claim for refund was sworn to by the president of petitioner corporation on September 2, 1937 and contained the sworn statement that petitioner bore the burden of the taxes, refund of which was claimed. Attached to the claim for refund, as Schedule D thereof (R. p. 20), petitioner submitted a schedule of gross profit percentages for the years 1927 to 1935, inclusive. Said schedule set forth the Sales, Cost of Sales, Gross Profit, and Percentage for each of said years. The sworn statement is also made in said schedule that "as shown by the schedule of gross profit percentages for the years 1927 to 1935 inclusive", claimant "did not shift to its vendees the burden of processing taxes".

After requesting and receiving several extensions of time from the Commissioner of Internal Revenue within which to submit additional evidence in support of the claim for refund, petitioner's attorney, on January 7, 1939 wrote to the Commissioner asking that the claim be withdrawn and marked rejected since the proof would be difficult to establish (R. p. 22). On January 31, 1939 petitioner was notified by the Commissioner that its claim for refund had been rejected on the ground that proof necessary to establish that plaintiff bore the burden of the tax, refund of which was claimed, was not submitted, as required by Section 902 of the Revenue Act of 1936. Said notification also advised the petitioner that by letter from petitioner's attorney, it was requested that the claim be withdrawn and considered rejected (R. p. 25).

On January 29, 1941 petitioner instituted suit in the District Court for the refund of the floor stocks taxes paid as aforesaid (R. p. 2). The respondent moved to dismiss the complaint for failure to state a claim upon which relief could be granted, or in the alternative, for an order granting summary judgment (R. p. 6). The District Court de-

nied the motion for summary judgment and granted the motion to dismiss the complaint for failure to state a claim. The grounds of the dismissal as they appear in the opinion of the District Court are: (1) the reason assigned for like action in *Bear Mill Mfg. Co. Inc.* v. *U. S.*, Civ. 16-48, and (2) by letter of January 7, 1939 petitioner's attorney withdrew the claim and requested that it be rejected (R. p. 37).

The reference concerning *Bear Mill Mfg. Co., Inc.* v. *U. S.*, made by the District Court is to an opinion rendered simultaneously in that case (R. p. 38). In said case a motion similar to that here involved was made by the defendant. The motion for an order dismissing the complaint was granted unless petitioner serve an amended complaint within a fixed period of time setting out the additional evidence, if any, submitted to the Commissioner (R. p. 39), or waiver of such submission by him (R. p. 44); the court's disposition of the motion was based on its holding that where there is no allegation in the complaint that the petitioner submitted evidence to the Commissioner sustaining the claim for refund, then no cause of action has been shown. The court relied on the case of *Samara* v. *U. S.*, 129 F. (2d) 594 (C. C. A. 2d, 1942).

A further opinion in the instant case was rendered by the District Court on February 12, 1944 (R. p. 43), wherein the original decision was adhered to and leave to amend the complaint was denied. Reargument was heard on March 16, 1944 before Hon. Francis G. Caffey, wherein the court stated the real ground of the dismissal of the complaint to be the withdrawal letter of January 7, 1939 written by petitioner's attorney (R. p. 22). The relief prayed for on said reargument was denied.

Judgment was entered on the dismissal of the complaint on February 25, 1944 (R. p. 56). The Circuit Court affirmed the judgment of the District Court (April 9, 1945) on the basis of *Samara* v. *U. S.*, *supra* (R. p. 61).

Jurisdictional Statement.

It is contended that the Supreme Court has jurisdiction to review the judgment here in question under the Act of February 13, 1925 (C. 229; 43 Stat. 938) amending the Judicial Code, Section 240, Title 28 U. S. C. A., Section 347; and under Rule 38, subdivision (5) of the Rules of the Supreme Court.

Questions Presented.

The questions herein presented are:

1. Do Sections 902 and 903 of the Revenue Act of 1936, and the provisions of Regulations 96 require that evidence be submitted to the Commissioner in support of a claim for refund of taxes paid under the Agricultural Adjustment Act of 1933 (48 Stat. 31)?

2. Is the rule in the *Samara* case the correct rule to be followed in actions for refund of taxes paid under said Act?

Reasons Relied on for Allowance of Writ.

1. The decision of the Circuit Court of Appeals for the Second Circuit in the within matter is in direct conflict with the decision of the Circuit Court of Appeals for the Third Circuit in the case of *Bethlehem Baking Co.* v. *U. S.*, 129 F. (2d) 490 (C. C. A. 3rd, 1942). In the course of its opinion in the instant case, the Circuit Court said (R. p. 64):

> "We decline, with deference, to subscribe to the reasoning and result in *Bethlehem Baking Co.* v. *United States,* 3 Cir., 129 F. (2) 490."

The cited case also involved a claim for refund under Title VII of the Revenue Act of 1936 of taxes paid under

the Agricultural Adjustment Act of 1933 (48 Stat. 31) and dealt with the question as to whether a claim for refund submitted to the Commissioner must be substantiated by evidence.

The instant decision is also in direct conflict with the following decisions of the United States District Courts in the Third, Fourth, Fifth and Ninth Circuits:

Hutzler Bros. v. *U. S.*, 33 Fed. Supp. 801 (D. C. Md. 1940);

Bullock's Inc. v. *U. S.*, 43 Fed. Supp. 861 (S. D. Calif. 1942);

Ney, et al. v. *U. S.*, 33 Fed. Supp. 554 (W. D. Va. 1940);

Joe Hanna v. *U. S.*, 27 AFTR 1135 (W. D. Texas 1940);

Bricker Baking Co. v. *Rothensies, et al.*, 46 Fed. Supp. 742 (E. D. Pa. 1942).

2. The decision of the Circuit Court of Appeals for the Second Circuit in the within matter is likewise in direct conflict with the following decisions of the Circuit Court of Appeals for the Fifth and Sixth Circuits:

Snead, Collector v. *F. H. Elmore*, 59 F. (2d) 312 (C. C. A. 5th, 1932) (26 U. S. C. A. 156; Reg. 45, Art. 1036);

Paul Jones & Co. v. *Lucas*, 33 F. (2d) 907 (D. C. Ky. 1929) Affirmed 64 F. (2d) 1016 (C. C. A. 6th, 1933) (Rev. Act of 1926, Sec. 1113[a]; Reg. 69, Art. 1304).

These cases involved claims for refund under other but similar statutes on the question as to whether a claim for refund submitted to the Commissioner must be substantiated by evidence. The authority for analogy to the

latter is found in the Congressional Committee Report on the Revenue Act of 1936 (C. B. 1939-1, Part 2, pp. 699-700).

The instant decision is also in conflict with the following decision of the United States District Court in the Sixth Circuit involving the same issue:

Fidelity & Columbia Trust Co. v. *Lucas*, 7 F. (2d) 146 (D. C. Ky. 1925).

3. The Circuit Court of Appeals for the Second Circuit has decided an important and substantial question of federal law which has not been and should be settled by the Supreme Court.

The *Samara* case, upon which the Circuit Court herein relied in affirming the District Court's decision, was followed by the Tax Court of the United States in *The Blum Folding Paper Box Company, Inc.* v. *Commissioner*, 4 TC No. 96 (promulgated February 19, 1945). That case involved an application for relief from excess profits taxes, under Section 722 of the Internal Revenue Code. The Tax Court found that "the statute and regulations applicable to the filing and disposition of applications for relief under Section 722 add up to similarity with those pertaining to the refund of processing and other taxes." The Tax Court in the cited case followed the *Samara* case, holding that it would not consider certain supplemental data at the trial which had not been submitted to the Commissioner prior to his disallowance of the claim.

Thus, the doctrine of the *Samara* case, enunciated as to processing taxes, the levy of which has long been held unconstitutional by the Supreme Court of the United States (*Butler* v. *U. S.*, 297 U. S. 1, 1936) has now been extended to cases involving excess profits taxes. The question involved in the *Samara* case, as in the instant case, that is, the question of the necessity of submission of evidence to the Commissioner and of the quantum of proof to be submitted, is one common to *any* claim for refund of *any*

type of taxes. As shown here, it has arisen in excess profits tax claims and will undoubtedly arise in numerous other tax claims. Said question therefore is an important question of federal law. Whether the *Samara* rule should be followed in cases of refund of taxes, or whether the rule of the Third Circuit should be followed, is the question which should be settled by the Supreme Court. It is submitted that the *Samara* case should not be further relied on unless sanctioned by the Supreme Court.

Further, the Circuit Court herein pointed out that three other cases (in the Fifth and Seventh Circuits), *Weiss* v. *U. S.*, 135 F. (2) 889, *Jaubert Bros. Inc.* v. *U. S.*, 141 F. (2) 206, and *New York Handkerchief Mfg. Co.* v. *U. S.*, 142 F. (2) 111, were in accord, although in those cases, the dismissals were for lack of jurisdiction. However, the basis for the dismissal in this case, as in the *Samara* case, was on the *merits*, the Circuit Court holding that the District Court had jurisdiction (R. p. 63). The so-called "holdings in accord" with the *Samara* doctrine are in reality not in accord, because there the District Courts were held never to have obtained *jurisdiction* of the actions on the stated ground that failure to submit the evidence to the Commissioner was fatal. Whether the failure to submit any evidence or sufficient evidence to the Commissioner in support of the claim for refund results in ousting the District Court of jurisdiction of an action for the refund, is an important question of federal law which should be settled by the Supreme Court.

Also, there are scores of cases such as the instant one still pending in the Federal District Courts. Recovery will be denied claimants in some circuits for the same reason that recovery was here denied, whereas, other claimants in similar factual situations, but in different circuits, will recover and have recovered. *If certiorari is here granted and the ultimate guiding rule in this type of case is announced by the Supreme Court, there will be uni-*

formity of decision in the several circuits. Thus, there will be no advantage afforded to some claimants solely by reason of their geographical location; further, many claimants will then be in a position to determine whether to proceed with or discontinue their actions, with a resultant saving of time and expense for the courts, counsel and litigants.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this court, directed to the Circuit Court of Appeals for the Second Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said Circuit Court had in the case entitled on its docket *Louis F. Hall & Co., Inc., Appellant* v. *United States of America, Appellee,* to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court be reversed by this Court, and for such further relief as this Court may deem proper.

Dated: June ....., 1945.

DAVID J. SHORB,
Counsel for Petitioner.